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APPLICATION OF EUROPEAN UNION LAW BY THE AUTHORITIES OF THE REPUBLIC OF POLAND

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Abstract: The application of European Union law by the authorities of the Republic of Poland is first and foremost about ensuring its true effectiveness. It is also related to the pro-EU interpretation of the law, as well as to liability for damages for failure to ensure its effectiveness. The last years of the functioning of the Republic of Poland in the EU are also related to the dispute between the Court of Justice

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of the European Union and the Constitutional Court, above all with regard to the primacy of the Constitution over the law of the European Union. The situation on this subject is dynamic, compared to earlier years. Therefore, the aim of this paper is to present the theoretical issues related to the application of European Union law and to address the current situation in this regard.

Keywords: constitutional supremacy; national law; European Union law; application of EU law.

The process of implementation of European Union (hereinafter: EU) law into the legal system of the Republic of Poland (hereinafter: RP) is aimed at ensuring the implementation of EU law in the legal system of the RP. This, in turn, is to ensure its full effectiveness in the domestic legal system. The final stage of this process is the application of the provisions of laws and regulations, as executive acts in relation to these laws, both by courts and by state administration bodies applying the law.

Therefore, for the correct implementation of EU law into the legal system of the Republic of Poland, the participation of domestic courts and state administration bodies is essential. As far as state administration bodies are concerned, administrative decisions in the cases of individual subjects are based on laws, some of which are the result of implementation activities (Prokopowicz, 2019). Courts, on the other hand, uphold compliance with the law and also apply these norms themselves (Trubalski). Therefore, we can speak of adjudication on the basis of implemented norms. This, in turn, is related to both the application of the norms in question, as well as their interpretation or the assessment of the correctness of its application (Voitovich, 2006).

Consequently, there can be no question of the correct implementation of EU law into the legal system, as well as the observance of EU law in the legal system of the Republic of Poland without the participation of the courts and state administration bodies. In fact, it is these entities that, when applying the law in individual cases, carry out concrete implementation of EU law, ensuring its effectiveness and, above all, its binding force in specific

cases. Therefore, without the participation of these entities, there would be no question of completing the implementation procedure at all.

This is particularly important in the context of the effectiveness of EU law in the legal system of the Republic of Poland. Furthermore, it is the task of both the courts and the administrative bodies to interpret the law in connection with its application. In connection with the participation of these entities in the final stage of the implementation process, the issue of interpretation of the norms of implementation acts favourable to EU law and the process of European integration becomes very important.

In other words, the mentioned entities are obliged to interpret the law pro-EU in the process of their activity. In the practice of the law implementation process, a pro-EU interpretation of the law is a very important element ensuring the effectiveness of EU law in the national legal system. This is because it allows imperfections and interpretative doubts related to the application of norms contained in implementation acts to be corrected through interpretation.

The lack of such an interpretation of the law that is

favourable to the process of European integration as well as to EU law could constitute a significant obstacle to the full implementation of EU law in the domestic legal system (Barcz, Górka, Wyrozumska, 2011). This would call into question the effectiveness and correctness of the entire implementation process. Undoubtedly, by way of interpretation of the law, it is possible to ensure, if necessary, the effect of full effectiveness of EU law in the legal system of the Republic of Poland and to ensure its effect to the fullest extent possible (Bartosiewicz, 2009).

State administration bodies and courts are entitled to interpret the law themselves in the course of their proceedings. However, in the case of courts, there is the possibility for them to make a preliminary reference to the Court of Justice of the European Union (hereinafter: CJEU) with a question concerning the interpretation of the law that will form the basis of their ruling. This is, of course, possible if the questionable regulation concerns EU law.

In addition, under the provision of Article 267 of the Treaty on the Functioning of the European Union, if doubts about EU law are raised by a national court whose decisions are not subject to appeal, it is obliged to make a preliminary

reference.

This means that the CJEU, by answering the national courts' questions in question, not only contributes to the clarification of possible doubts, but also ensures the uniform application of EU law in the legal systems of the Member States (Biernat, Dudzik, 2011).

The activity of the CJEU related to ensuring uniform interpretation of EU law, as well as compliance with it, is aimed at ensuring its effectiveness in national legal systems. The interaction of the courts in question with the CJEU can thus be described as a form of prior control of Member States' compliance with EU law. It will take place in the form of preliminary questions submitted to the CJEU by the national courts of the Member States. Also, ensuring a uniform interpretation of the law has an impact on ensuring the effectiveness of EU law in the legal systems of the Member States (Kuś, 2010).

Obviously, it must be assumed that this procedure is aimed at preventing Member States from infringing EU law that would conflict with the obligation to implement it in their national legal systems. Therefore, it should be concluded that the cooperation of national courts in the CJEU is one of

the ways of ensuring both the validity and the effectiveness of EU law in the Polish legal system.

Characteristic of this way of ensuring the effectiveness of EU law is its prior, preventive form. Unlike the current ensuring of the effectiveness of EU law in the legal system of the Republic of Poland, which takes place in the course of action of the courts and organs of state authority, the prior review allows for a kind of consultation regarding the application of the law between the national court and the CJEU.

It should also be noted that the preliminary ruling procedure is indispensable, as in this procedure a review of the validity of EU law and its interpretation can be brought, at the request of the national court. In addition, this court does not have the power to examine the validity of EU law. Only the CJEU has this power.

From the point of view of the application and interpretation of the law, the validity of EU legal acts is of great importance. This is because the annulment of an EU legal norm could entail that it does not have to be applied. As already mentioned, only a ruling of the CJEU in this regard would provide such a possibility.

Under Article 10(2) of the Constitution, the judicial power is exercised by the courts and tribunals. In turn, under Article 175(1) of the Constitution, the administration of justice in the Republic of Poland is exercised by the Supreme Court, ordinary courts, administrative courts and military courts. This means that a preliminary question to the CJEU may be submitted by the entities specified in the above provisions. Therefore, a preliminary question to the CJEU by the Constitutional Court (hereinafter: TK) is not excluded (Kustra, 2012). Due to the principle of pro-EU interpretation which is also a principle of operation of the Constitutional Court and due to the community of values underpinning the legal order of the Republic of Poland and the legal order of the EU, it seems that in practice there should be no discrepancies in the interpretation of EU law by the Constitutional Court and by the CJEU (Trubalski, 2016). Nevertheless, especially in recent times, there has been a divergence between the position represented by the CJEU and the TK against the background of the functioning of the judiciary in Poland and the question of the primacy of the Polish Constitution over the EU treaties. According to the CJEU, treaty law takes precedence over

the constitution. The TK, on the other hand, takes a different view, as does, for example, the German constitutional court. Over the years, the Polish constitutional court has invariably presented a view of the supreme and absolute legal force of the constitution. Thus, despite the formal possibility for the Constitutional Tribunal to submit a question to the CJEU for a preliminary ruling, the practical occurrence of such a situation seems unlikely. Such a view appears to be legitimate, and the Constitutional Court should be regarded as a body which, due to its place in the system of constitutional organs of the state, is fully entitled to interpret EU law (Koncewicz, 2012). What is more, it should be considered that it even has such an obligation and should do so on its own without the need to refer a preliminary question to the CJEU.

An additional argument supporting such a view is the aforementioned primacy of the Constitution over EU law. Thus, if the CJEU is the body controlling the compliance of EU law (primary and derivative) with the Constitution, it is unjustified for the CJEU to submit a question on the interpretation of EU law.

The Constitutional Court examines the compliance of EU

law with the supreme normative act, which is the Basic Law.

Finally, it should also be stated that pursuant to Article 8 of the Constitution, this particular legal act is the supreme law of the Republic of Poland. Moreover, such a position is confirmed by the content of Article 91(2) of the Constitution, according to which

“an international agreement ratified with prior consent expressed in a law takes precedence over a law, if the latter cannot be reconciled with the agreement”.

This provision only refers to the primacy of EU treaty law over the law and only if the law cannot be reconciled with the agreement. This lacks any reference to the Constitution. However, according to Article 91(3) of the Basic Law,

“If it results from an agreement ratified by the Republic of Poland constituting an international organisation, the law established by it shall be applied directly, taking precedence in the event of a conflict with the laws”.

The conditional precedence of the law established by the EU (derived law) in the situation of its inconsistency with the law is also regulated in this provision. Once again, the

content of the provision does not refer to a regulation of constitutional rank.

In view of the above, one can in practice only imagine a situation in which, in the process of adjudication by the TK, a doubt arises as to the validity of EU law. In such a situation, the only entity that could rule on the invalidity of an EU legal act is the CJEU. In other words, the TK does not have such a power. Theoretically, doubts as to the validity of EU law could arise in the process of examining the constitutionality of EU law.

It could be challenged in the event that it had at its core principles contrary to the supreme constitutional principles. Given the practical possibility of a preliminary question to the CJEU, the common courts and the Supreme Court, as well as the administrative courts and the Supreme Administrative Court, should be considered as the relevant entities. Pursuant to the provision of Article 183(1) of the Constitution, the Supreme Court supervises the activities of the ordinary courts in terms of adjudication. On the other hand, under Article 184 of the Constitution, the Supreme Administrative Court and other administrative courts exercise, to the extent specified by law, control over the

activities of the public administration. Pursuant to the provisions regulating proceedings before the ordinary courts and before the Supreme Court, there is no right of appeal against the decisions of the latter.

As regards the provisions regulating proceedings before administrative courts, which also include the Supreme Administrative Court, as a rule, no appeal is available against decisions of the latter. This means that if doubts are raised as to the interpretation of EU law or its validity, the Supreme Court as well as the Supreme Administrative Court are obliged to make a preliminary reference to the CJEU with a question (Trubalski, 2016).

The other courts have a power in this respect, which is of an optional nature. The possibility or obligation of the above national courts to cooperate with the CJEU, also aims to ensure the effectiveness of EU law in the legal system of the Republic of Poland and to ensure a prior (preventive) control of the interpretation of EU law. This is intended to prevent, in the long run, a violation of EU law by a national court, the consequence of which could be state liability for damages (Granat, Warsaw 2007).

In conclusion, it should be pointed out that over the last

few years, especially the Supreme Court, but also other courts have been addressing questions to the CJEU for preliminary rulings. Again, their main focus has been on the functioning of the judiciary in the Republic of Poland and the interplay between EU law and the Constitution.

A trend became apparent whereby the CJEU questioned the model of the judicial council functioning in the Republic of Poland, the method of appointment of judges, as well as the model of disciplinary responsibility of judges, despite the fact that the solutions functioning in the Republic of Poland in this respect were based on models that had been functioning in other EU countries for many years.

A different view in this respect was expressed by the Constitutional Tribunal, arguing that the CJEU does not have the competence to assess the judiciary in the Republic of Poland, as well as in other EU states, as competences concerning the judiciary have not been transferred to this international organisation. An element of ensuring the effectiveness of EU law in the legal system of the Republic of Poland is the possibility to initiate and carry out a procedure aimed at controlling compliance with EU law in the legal system of the Republic of Poland. Thus, if the

process of implementation of EU law into the legal system of the Republic of Poland is not carried out or is carried out incorrectly, there will be no implementation of EU law in the legal system of the Republic of Poland. This, in turn, will mean that EU law has not acquired in the legal system of the Republic of Poland the attribute of validity and, consequently, the attribute of effectiveness.

It should also be noted at this point that despite the fact that acts of EU law have the value of direct effectiveness in the legal system of the Republic of Poland and that an individual may invoke them directly, this does not relieve the competent authorities of the Republic of Poland from the obligation to implement EU law in the legal system of the Republic of Poland. Therefore, the obligation to implement EU law exists despite the fact that individual entities may invoke the provisions of directives directly.

This is possible in a situation of lack of or inadequate implementation. Both the actions taken by the state administration bodies applying the law and the adjudicatory activity of national courts are elements of the final stage of the process of implementation of EU law into the legal system of the Republic of Poland.

These entities are furthermore obliged to provide a pro-EU interpretation of the law aimed at ensuring its implementation and ensuring its effectiveness (Barcz, 2011).

An important addition to these elements of the final stage of implementation is undoubtedly the possibility, and in some cases the obligation, for national courts to request preliminary questions from the CJEU (Wyrozumska, 2010).

Their purpose is to ensure compliance with EU law in the domestic legal system, the consequence of which is to ensure the validity of this law and its effectiveness in the domestic legal system. This is because they are procedures of an antecedent nature that make it possible to avoid infringement of EU law at the final stage of the implementation process. Both the prejudicial question procedure and the principle of pro-EU interpretation of the law are aimed at avoiding a situation in which a complaint is submitted to the CJEU against a state for violation of EU law. If, on the other hand, a complaint has already been lodged, the prior submission of a preliminary question by a court, or the application of a pro-EU interpretation of the law by a state administration or a national court, minimise

the danger of a ruling by the CJEU stating that EU law has been infringed and opening the way for possible claims for damages.

Therefore, the procedure of prejudicial questions and pro-EU interpretation of the law are elements of the final stage of the implementation of EU law, necessary for the proper conduct of the entire process and, consequently, for the proper implementation of EU law in the legal system of the Republic of Poland, the consequence of which must be to ensure the effect of validity and the effect of effectiveness of EU law in the legal system of the Republic of Poland. It seems that only with the use of the procedure of prejudicial questions and pro-EU law interpretation will these effects be fully achieved. EU law constitutes a specific legal order separate from international law, as well as from the national law of the Member States. Its nature and obligation to ensure the effectiveness of EU law is implemented in the legal systems of the Member States.

The absence, as well as the inadequate implementation of EU law in the national legal system leads to a breach of one of the fundamental obligations of the state resulting from EU membership.

Failure to comply with the implementation obligation implies a potential liability of the state for damages. On the one hand, a procedure aimed at punishing a Member State may be initiated by the Commission or by another Member State. On the other hand, a judgment of the CJEU finding a state in breach of EU law allows for the imposition of a fine on the state (Trubalski, 2016).

On the other hand, private parties have the possibility to turn to the CJEU with a complaint against a Member State for breach of EU law. In particular, the latter procedure is important for effectively ensuring the validity and effectiveness of EU law in the legal systems of Member States. This is because it allows for the initiation of proceedings by the CJEU, which, in the event that this body finds a violation of EU law, allows a private entity to seek compensation from the state that violated EU law (Wyrozumska, 2010).

The principle of the direct effect of EU law in the legal systems of the Member States has been sanctioned by the jurisprudence of the CJEU.

EU Member States are obliged to comply with the norms contained therein and ensure that they are valid and fully

effective in their national legal systems. This means that there are effectively three legal orders in force within a Member State: EU, national and international. Nevertheless, the obligations arising from the treaties that underpin the functioning of the EU imply the primacy of EU law over national law (with the exception of the Constitution). It implies the precedence of the application of EU law norms over national law norms in the event of a conflict arising from their content.

The CJEU's position is that EU law takes precedence over all national legal norms. However, in the reality of the legal system of the Republic of Poland (as well as other countries such as Germany), this priority does not apply to norms of constitutional rank. In principle, EU law sanctions the principle of state liability vis-à-vis private parties for breach of EU law.

A judgment of the CJEU declaring the breach in question is the basis for initiating proceedings to compensate a private entity for the damage it has suffered as a result of the state's breach of EU law. This breach may primarily relate to the lack of, or incorrect implementation of EU law, as well as the non-application, or misinterpretation, of EU law

by national law enforcement authorities.

The basis for a claim for damages may therefore be a failure to apply EU law in the sense of not giving it the value of priority in the event of a collision with domestic law, as well as a failure to apply EU law on the basis of the principle of its direct effectiveness, in the event of a lack of or incorrect implementation of EU norms into the legal system of the Republic of Poland.

Also, the failure of state authorities to interpret the law in a pro-EU manner may lead to a claim for damages. Therefore, a breach of any of the above-mentioned obligations may be the foundation of the state's liability for damages against private parties. However, the EU institutions are not competent to adjudicate on the award of damages to private parties for the harm suffered as a result of a breach of EU law by a Member State.

The role of the EU bodies and, more specifically, of the CJEU is limited only to establishing a breach of EU law by a Member State. When it comes to the recovery of damages, the principle of procedural autonomy applies in EU law (Wróbel, 2010).

It means that the legal basis for claiming damages is the

national laws of the Member States. This applies both to the substantive rules governing the principles and scope of liability for damages, as well as to the procedural rules related to the procedure for claiming damages.

EU law standards set minimum standards with which national regulations relating to state compensation to private parties for breach of EU law must comply. These standards relate primarily to the right to effective judicial protection. Furthermore, Member States are obliged to establish appropriate legal remedies and procedures to ensure the application of this right.

It is important to emphasise that, as far as national procedural standards for the redress of grievances are concerned, they must not only comply with the aforementioned principles sanctioned by the CJEU but also ensure effective protection of the rights of private parties. In turn, private parties must have a right corresponding to this obligation. Furthermore, the principles of effective judicial protection derived by the CJEU from EU law are also supported by the common constitutional traditions of the Member States with regard to standards of legal protection.

The CJEU's case law furthermore formulates the principles that must be fulfilled in order for there to be a principle of effective protection of the rights of private parties in a Member State in relation to an injury caused by a breach of EU law by the State.

The first of these is the principle of equivalence. It means that national rules relating to EU claims cannot be less favourable than those governing the same right of action in a purely internal (EU) case. This principle is derived by the CJEU from the general principle of non-discrimination. The second principle is the principle of effectiveness. According to it, national norms must not prevent or impede the exercise of the rights which are to be protected by these courts.

The practice of the functioning of the Republic of Poland in the EU indicates that, at the initial stage, the application of EU law by courts and public authorities was not controversial (Trubalski, 2016).

Also, the relations between the legal system of the Republic of Poland and the EU legal system did not give rise to divergent interpretations thanks to the pro-EU interpretation of EU law by the authorities of the Republic

of Poland. Over time, however, divergences began to emerge in the understanding of the interrelationship between the aforementioned legal systems. Particularly the issue of the supremacy of the Constitution in relation to EU law, which was formulated from the very beginning in the jurisprudence of the Constitutional Tribunal and, moreover, confirmed in its subsequent rulings. It can be said that constitutional practice led to a situation where the CJEU began to apply an increasingly dynamic and expansive interpretation of the EU treaties, which began to have the hallmarks of a law-making activity.

These tendencies were opposed by the CJEU relying not only on its own case law but also on the established case law of the German constitutional court.

At present, it can be said that there is a clash between the concept presented by the CJEU and the concept presented by the TK. It can be expected that this process will evolve depending on the strength and importance of federalist tendencies within the EU. Therefore, it can be assumed that the issues of mutual relations between the legal systems of the Republic of Poland and the EU and, consequently, the application of EU law in the legal system of the Republic of

Poland will require further analysis also in the future.

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